

Jun 21, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ERIC LEE BOOTH,

Petitioner,

NO. 2:18-cv-00010-SAB

v.

DONALD R. HOLBROOK,

Respondent.

**ORDER DISMISSING PETITION
FOR WRIT OF HABEAS
CORPUS**

Before the Court are Eric Lee Booth's Amended Petition for Writ of Habeas Corpus, ECF No. 5, and Amended Motion for Equitable Tolling for Federal Habeas 2254, ECF No. 6. Petitioner seeks federal habeas relief from his Washington murder conviction on the basis of ineffective assistance of counsel, and requests the Court excuse the untimeliness of his petition on the basis of equitable tolling due to mental impairment.

To benefit from equitable tolling due to mental impairment, Petitioner must satisfy the two-prong test established in *Bills v. Clark*, 628 F.3d 1092, 1099-1100 (9th Cir. 2010). For the reasons set-forth below, the Court finds Petitioner has not provided sufficient evidence to justify equitable tolling of the federal habeas limitations period. Accordingly, the Court denies Petitioner's Amended Motion for Equitable Tolling for Federal Habeas 2254, ECF No. 6, and dismisses as untimely Petitioner's Amended Petition for Writ of Habeas Corpus, ECF No. 5.

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ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS ^ 1

BACKGROUND

On March 7, 2012, Eric Lee Booth (“Petitioner”) pleaded guilty to First Degree Murder, Premeditated Murder and Felony Murder, in violation of Wash. Rev. Code § 9A.32.030(1)(a) and (c). State Court Record, ECF No. 10, Ex. 1. The Stevens County Superior Court sentenced Petitioner to 320 months incarceration, a sentence that fell within the standard sentencing range.¹ ECF No. 10-1 at 5.

On September 5, 2014, Petitioner filed a document in the Washington Court of Appeals, Division III, captioned “Motion to Appoint Attorney,” along with an introduction that states he was “filing for a PRP after the 1 year limit on the grounds of newly discovered evidence.” ECF No. 10, Ex. 4. The Court of Appeals construed Petitioner’s motion as a personal restraint petition (“PRP”), and dismissed it as untimely under Washington law. *Id.* Ex. 5.

Petitioner sought discretionary review by the Washington Supreme Court. *Id.* Ex. 6. The Washington Supreme Court denied review on June 25, 2015, finding the Court of Appeals did not err in dismissing Petitioner’s PRP as untimely. *Id.* Ex. 7.

On October 3, 2016, Petitioner filed a second PRP to the Washington Court of Appeals, Division III, challenging his conviction on the basis of ineffective assistance of counsel. *Id.* Ex. 9. He requested the Court to consider his otherwise untimely petition on the basis of equitable tolling due to mental incompetence. *Id.* The Court of Appeals dismissed the PRP as untimely. *Id.* Ex. 11. Petitioner’s request for discretionary review was denied on June 21, 2017. *Id.* Exs. 12-13. The Washington Supreme Court found Petitioner’s PRP was successive, untimely, and that he had failed to show circumstances to justify equitable tolling.

On January 22, 2018, Petitioner filed a third PRP with the Washington Supreme Court challenging the factual basis of his conviction. *Id.* Ex. 15. The

¹ Petitioner's sentencing range was 240-320 months. ECF No. 10-1 at 4.

1 Washington Supreme Court transferred the PRP to the Washington Court of
2 Appeals, Division III. *Id.* Ex. 16. The Court of Appeals dismissed Petitioner's third
3 PRP as untimely. *Id.* Ex. 17. Petitioner did not seek discretionary review.

4 On January 10 2018, Petitioner filed with this Court a Petition for Writ of
5 Habeas Corpus, ECF No. 1, and Motion for Equitable Tolling, ECF No. 2.
6 Petitioner later submitted an Amended Petition for Writ of Habeas Corpus, ECF
7 No. 5, and Amended Motion for Equitable Tolling for Federal Habeas 2254, ECF
8 No. 6. Petitioner seeks federal habeas relief on the basis of ineffective assistance of
9 counsel, and requests the Court excuse the untimeliness of his petition on the basis
10 of equitable tolling due to mental impairment.

11 On March 16, 2018, the Court Ordered Respondent to respond to the
12 Amended Petition. ECF No. 7. Respondent timely filed its response. ECF No. 9.

13 STANDARD

14 A petition for writ of habeas corpus on behalf of a prisoner in state custody
15 is brought under 28 U.S.C. § 2254. Relief from § 2254 is limited to “violation[s] of
16 the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

17 Where the challenged judgment became final after April 24, 1996, the
18 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) establishes a
19 one-year limitations period for seeking federal habeas review. *See id.* § 2244(d)(1).

20 The limitations clock begins to run from the latest of:

- 21 (A) The date on which the judgment became final by the conclusion of
direct review or the expiration of the time for seeking such review;
- 22 (B) The date on which the impediment to filing an application created by
State action in violation of the Constitution or laws of the United
23 States is removed, if the applicant was prevented from filing such
State action;
- 24 (C) The date on which the constitutional right asserted was initially
recognized by the Supreme Court, if the right has been newly
25 recognized by the Supreme Court and made retroactively applicable to
cases on collateral review; or

1 (D) The date on which the factual predicate of the claim or claims
2 presented could have been discovered through the exercise of due
3 diligence.

4 *Id.* § 2244(d)(1)(A)-(D).

5 Subsection (A) appears to govern the petition before the Court; the “date on
6 which the judgment became final by the conclusion of direct review or the
7 expiration of the time for seeking such review.” *Id.* § 2254(d)(1)(A). When a
8 challenge to a state court conviction presents a federal question, the Supreme Court
9 has held that “the process of direct review . . . includes the right to petition the
10 [Supreme Court] for a writ of certiorari.” *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th
11 Cir. 1999) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). However, a
12 judgment becomes final on an earlier date where there is no direct review.
13 *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). If the petitioner does not timely
14 seek appellate review, the direct review process concludes upon expiration of time
15 for seeking such review. *Id.*

DISCUSSION

16 In this case, Petitioner pleaded guilty and was sentenced on March 7, 2012.
17 Because the Stevens County Superior Court imposed a sentence within the
18 sentencing range, Petitioner had no right to appeal his sentence. *See Wash. Rev.*
19 *Code* § 9.94A.585(1) (“A sentence within the standard sentence range . . . shall not
20 be appealed.”). Accordingly, Petitioner’s time for filing a timely habeas petition
21 began on March 7, 2012, and expired on March 7, 2013.

22 Petitioner filed his first petition for federal habeas review on January 10,
23 2018, ECF No. 1, and later filed an amended petition on February 5, 2018, ECF
24 No. 5. There is no dispute Petitioner filed the instant petition well after the one-
25 year limitations period. The issue, then, becomes whether Petitioner can benefit
26 from any type of tolling.

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1 ***Statutory Tolling***

2 The limitations period is tolled while a “prisoner’s ‘properly filed
3 application for State post-conviction or other collateral review with respect to the
4 pertinent judgment or claim is pending.’” *Banjo v. Ayers*, 614 F.3d 964, 968 (9th
5 Cir. 2010) (quoting 28 U.S.C. § 2244(d)(2)). “A habeas petition that is untimely
6 under state law is not ‘properly filed.’” *Curiel v. Miller*, 830 F.3d 864, 868 (9th
7 Cir. 2016) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005)). Thus, “none
8 of the time before or during the state court’s consideration of an untimely petition
9 is tolled for purposes of AEDPA’s limitations period.” *Id.* at 868. In this case,
10 Petitioner cannot benefit from statutory tolling because his petitions for State post-
11 conviction relief were deemed untimely by the Washington Court of Appeals and
12 the Washington Supreme Court.

13 ***Equitable Tolling***

14 A petitioner seeking equitable tolling bears the burden of establishing that
15 (1) he has been pursuing his rights diligently, and (2) some extraordinary
16 circumstance stood in his way and prevented timely filing of the petition. *Holland*
17 *v. Florida*, 560 U.S. 631, 649 (2010) (citing *Pace*, 544 U.S. at 418).

18 Petitioner argues he is entitled to equitable tolling because a mental
19 impairment made him unable to see or understand that he had a claim for post-
20 conviction relief. ECF No. 6. A petitioner is entitled to equitable tolling due to
21 mental impairment when the petitioner meets the following two-prong test:

- 22 (1) First, a petitioner must show his mental impairment was an
23 “extraordinary circumstance” beyond his control, by demonstrating the
24 impairment was so severe that either;
25 (a) petitioner was unable rationally or factually to personally
26 understand the need to timely file, or
27 (b) petitioner’s mental state rendered him unable personally to prepare
28 a habeas petition and effectuate its filing.^[1]
- 22 (2) Second, the petitioner must show diligence in pursuing the claims to the
23 extent he could understand them, but that the mental impairment made it

1 impossible to meet the filing deadline under the totality of the
2 circumstances, including reasonably available access to assistance.

3 *Bills*, 628 F.3d at 1099-1100 (internal citations omitted). This test is a stringent
4 one. *Yow Ming Yeh v. Martel*, 751 F.3d 1075, 1078 (9th Cir. 2014) (holding that
5 this test “reiterates the stringency of the overall equitable tolling test: the mental
6 impairment must be so debilitating that it is the but-for cause of the delay, and even
7 in cases of debilitating impairment the petitioner must still demonstrate
8 diligence”).

9 As to the first prong, Petitioner argues he is diagnosed with “borderline
10 intellectual disorder,” a cognitive impairment that he claims renders him unable to
11 understand the applicable law, and to see how the facts in his case were relevant to
12 a legal claim. Petitioner cites to the psychiatric evaluation used to determine his
13 competency to stand trial in January 2012. In the competency evaluation, Drs.
14 William Grant and Nathan Henry diagnosed Petitioner with Borderline Intellectual
15 Functioning and Antisocial Personality Features. ECF No. 6, Ex A. The doctors
16 explained that “Borderline Intellectual Functioning reflects the defendant’s
17 intellectual functioning, which was judged to be below average but not in the
18 mentally retarded range.” *Id.*

19 Additionally, Petitioner’s jailhouse lawyer, Joshua Lambert, claims to have
20 witnessed personally the extent to which Petitioner’s mental impairment has
21 affected his ability to do his own legal work. Mr. Lambert claims Petitioner’s
22 impairment results in his inability to scan through research materials and case law,
23 and to find relevant or potentially relevant topics to lead him to the applicable legal
24 standards that could be useful in his case. *Id.*, Ex. B. Mr. Lambert claims Petitioner
25 is unable to adequately “assess” the research text he reads, and that he does not
26 understand the terms or the legal standards and concepts.

27 Mr. Lambert also claims Petitioner’s mental impairment caused him to
28 overlook the legal issues present in the plea agreement materials he signed. For

1 example, Mr. Lambert asserts that Petitioner was unable to see how the term
2 “panick” in his plea statement and probable cause statement is not “premeditation,”
3 *Id.* ¶ 2, and that he was unable to see that the probable cause statement stating
4 Petitioner was “evasive” was conclusory, and the he should have pointed out that
5 he was invoking his right to silence. *Id.*

6 Finally, Mr. Lambert cites to objective signs² that he believes a doctor would
7 consider signs or possible signs of Petitioner’s cognitive disorder.

8 Respondent contends that while Petitioner has a mental illness, he fails to
9 show it has either prevented him from understanding the need to file a petition, or
10 actually prevented him from filing a petition.

11 The Court finds Petitioner has failed to make a showing that his mental
12 impairment was *so severe* it rendered him unable personally to prepare a habeas
13 petition and effectuate its filing. *Bills*, 628 F.3d at 1100 (emphasis added). The
14 heart of Petitioner’s argument is that his mental impairment prevents him from
15 understanding legal concepts, and conducting legal research effectively. The issue
16 with Petitioner’s position is that the law is complex, and it is not out of the
17 ordinary for a lay person to have difficulties understanding the law or recognizing
18 when they may have a viable claim for post-conviction relief.

19 The standard, however, requires Petitioner to demonstrate his mental
20 impairment was so severe that it rendered him “unable to take steps to effectuate
21 [the] filing”³ of a petition. *Id.* at 1100 n. 2. Petitioner has not provided sufficient
22 evidence for the Court to make such a finding.

23 ² Mr. Lambert states: “(1) [Petitioner] is kind of quiet; (2) his smile is ‘slightly’
24 delayed from when the thing he smiles about is said, and also the speed of his
25 smiling and demeanor is ‘slightly’ slower from when he starts to smile until his
whole face lights up; and (3) he has slight flat affect.” *Id.* ¶ 6.

26 ³ A petitioner can satisfy the first prong of the *Bills* inquiry by showing his mental
27 impairment was so severe that he did not understand the need to timely file *or* that
it made him unable to take steps to effectuate its filing. *Bills*, 629 F.3d at 1100 n.2.
28 Petitioner’s argument focuses on the latter.

1 In fact, the record contains evidence to the contrary. Petitioner was able to
2 take steps to effectuate several post-conviction filings with the State. These filings
3 happened several years before Petitioner submitted the instant federal habeas
4 petition. Moreover, his PRPs to the Washington Court of Appeals attempted to
5 invoke an exception to the one-year time bar for collateral review in Washington.
6 Wash. Rev. Code § 10.73.090(1); ECF No. 10, Exs. 4, 9. This demonstrates
7 Petitioner’s mental impairment did not prevent him from seeking assistance to file,
8 or understanding the need to timely file a petition for post-conviction relief. *See*
9 *Bryan v. Glebe*, No. C14-5147 BHS-KLS, 2016 WL 7971770, at * 5 (W.D. Wash.
10 Dec. 8, 2016)

11 The second prong of the *Bills* inquiry requires the Court to determine
12 whether Petitioner’s mental impairment was a but-for cause of any delay. *Bills*, 628
13 F.3d at 1100. “[A] petitioner’s mental impairment might justify equitable tolling if
14 it interferes with the ability to understand the need for assistance, the ability to
15 secure it, or the ability to cooperate with or monitor assistance the petitioner does
16 secure.” *Id.* Thus, the petitioner “always remains accountable for diligence in
17 pursuing his or her rights.” *Id.*

18 Petitioner argues he satisfies the second prong of the *Bills* inquiry because
19 he did not have access to a “legitimate”⁴ jailhouse lawyer for assistance in filing
20

21 ⁴ Petitioner claims those jailhouse lawyers Petitioner initially spoke with were not
22 “legitimate” because (1) it is self-evident that they didn’t see a potential unlawful
23 search and seizure issue; (2) its self-evident that they didn’t see that the facts in
24 Petitioner’s plea statement and affidavit of probable cause did not constitute
25 “premeditation: because “panick” is not premeditation; (3) a jailhouse lawyer
26 would have known to check the plea statement as soon as they found out Petitioner
27 has been in prison longer than one year and he didn’t file a direct appeal, because
28 the statutory deadline for state collateral attacks is one year unless the judgment
and sentence is invalid on its face, and no other inmate (besides Joshua Lambert)
asked Petitioner to see his plea statement; (4) a previous inmate wrote a PRP for
Petitioner that was dismissed as frivolous; (5) the law library clerks are not given

1 his petition. Respondent contends Petitioner has failed to show he acted with due
2 diligence in filing a federal habeas petition before the limitations period expired in
3 March 2013.

4 The Court finds Petitioner has failed to demonstrate that his mental
5 impairment made it *impossible* to meet the filing deadline, under the totality of the
6 circumstances. *Id.* at 1100. Petitioner is correct that the availability of jailhouse
7 assistance is relevant in making this determination. *See id.* at 1101. The issue is
8 that Petitioner attempts to show a lack of access to jailhouse assistance, by arguing
9 that he did not have access to “legitimate” jailhouse lawyers. When analyzing the
10 availability of jail house assistance, the Court in *Bills* does not address the
11 perceived skill-level of such assistance:

12 The availability of assistance is an important element to a court’s diligence
13 analysis. For example, if prison officials or even other prisoners were readily
14 available to assist Bills in filing his habeas petition but Bills refused to
15 accept their assistance, a court could conclude Bills may not have been
16 diligent in pursuing his claims such that he is entitled to equitable tolling.
17 That is not to say a prisoner fails the diligence requirement for refusing
18 jailhouse assistance. It is only part of the overall assessment of the totality of
19 circumstances that goes into the equitable determination. Thus, in many
20 circumstances, the existence of such help would be highly relevant to the
21 question of whether a petitioner’s mental condition made it impossible to file
22 a timely petition. But the availability of jailhouse assistance could also cut
23 the other way. If legal help is available only because a prisoner has to resort
24 to bribery or succumb to extortion, and a prisoner does not do so, a court
25 would not find a lack of diligence.

26 *Id.* at 1101.

27 The facts in this case show Petitioner had access to individuals who were
28 prepared to assist him in filing a petition for post-conviction relief. Whether those
any special training in the law; and (6) Petitioner lives in the mental health unit and
presumably has less access to inmates who study the legal system.

1 Accordingly, Petitioner has not established his burden under *Bills* and the Court
2 declines to toll the federal habeas limitations period on an equitable basis.

CERTIFICATE OF APPEALABILITY

A petitioner seeking post-conviction relief under § 2254 may appeal a district court’s dismissal of his federal habeas petition only after obtaining a certificate of appealability from a district or circuit judge. A certificate of appealability may issue only where a petitioner has made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard when “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.”

12 *Boyer v. Chappell*, 793 F.3d 1092, 1106 (9th Cir. 2015) (quoting *Miller-El v.*
13 *Cockrell*, 537 U.S. 322, 336 (2003)) (internal quotation marks omitted). The Court
14 finds Petitioner has not made such a showing.

Accordingly, IT IS HEREBY ORDERED:

16 1. Petitioner's Amended Motion for Equitable Tolling for Federal Habeas
17 2254, ECF No. 6, is **DENIED**.

18 2. Petitioner's Amended Petition for Writ of Habeas Corpus, ECF No. 5, is
19 **DISMISSED with prejudice**, pursuant to 28 U.S.C. § 2244(d).

20 3. Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the
21 United States District Courts, a certificate of appealability is **DENIED**.

22 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
23 enter this Order, furnish copies to counsel and pro se Petitioner, and **close** this file.

DATED this 21st day of June 2018.



Stanley A. Sestan

Stanley A. Bastian
United States District Judge